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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 MORENO, ET AL.,

13 Plaintiffs,

14 v.

15 USG CORPORATION, ET AL.,

16 Defendants.
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Civil No: 06-CV-2196-B(PCL)

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) **ORDER (1) DENYING IN PART,**
) **GRANTING IN PART**
) **DEFENDANT USG**
) **CORPORATION’S MOTION TO**
) **DISMISS THE FIRST AND**
) **SECOND CAUSES OF ACTION**
) **FROM PLAINTIFFS’**
) **COMPLAINT; AND (2)**
) **GRANTING PLAINTIFFS**
) **THIRTY DAYS TO AMEND**
) **THEIR COMPLAINT**
) **ACCORDINGLY**

22 **I. INTRODUCTION**

23 Before this Court is Defendant USG Corporation’s (“USG”) Motion to Dismiss the
24 First and Second Causes of Action from Plaintiffs’ Complaint filed on November 13, 2006.
25 (Doc. No. 7.) For the reasons set forth below, the Court (1) **GRANTS** USG’s Motion to
26 Dismiss the First Cause of Action for not adequately pleading that manufacturer Defendant
27 Coe Manufacturing Company (“Coe”) conveyed knowledge of the design, installation, and
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1 attachment of the guards onto the power press to employer USG as required under
2 California Labor Code § 4558(c); (2) **GRANTS** Plaintiffs **thirty (30) days** from the date of
3 the filing of this Order to amend their complaint accordingly; (3) **DENIES** USG's Motion
4 to Dismiss the First Cause of Action on all other grounds presented by USG; and (4)
5 **DENIES** USG's Motion to Dismiss the Second Cause of Action.

6 7 **II. BACKGROUND**

8 Plaintiffs Gilbert Moreno and his wife Angela Moreno filed the present suit on
9 October 4, 2006, alleging (1) negligence against USG and Coe, (2) strict liability in tort
10 against USG and Coe, and (3) loss of consortium. (Doc. No. 1.) The Court has jurisdiction
11 under diversity of citizenship. (*Id.* at 1 - 2.) Plaintiffs allege that G. Moreno was assigned
12 by his employer USG to the #1 Board Line machine, which was designed, manufactured,
13 and distributed by Coe. (*Id.* at 2.)

14 On November 13, 2006, Defendant USG filed the present Motion to Dismiss the
15 First and Second Causes of Action from Plaintiffs' Complaint, which are Negligence and
16 Strict Liability in Tort against USG. (Doc. No. 7.)

17 18 **III. DISCUSSION**

19 **A. STANDARD OF LAW**

20 **1. Motion to dismiss for failure to state a claim**

21 A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil
22 Procedure ("FRCP") 12(b)(6) tests the legal sufficiency of the claims in the complaint. A
23 claim can only be dismissed with prejudice if "it appears beyond doubt that the plaintiff can
24 prove no set of facts in support of his claim which would entitle him to relief." *Conley v.*
25 *Gibson*, 355 U.S. 41, 45-46 (1957). The court must accept as true all material allegations
26 in the complaint, as well as reasonable inferences to be drawn from them, and must
27 construe the complaint in the light most favorable to plaintiff. *See Abramson v.*

1 Brownstein, 897 F.2d 389, 391 (9th Cir. 1990). Furthermore, a court should not grant a
2 Rule 12(b)(6) motion without leave to amend unless “it appears beyond doubt that the
3 plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”
4 Id.

5 “Generally, a district court may not consider any material beyond the pleadings in
6 ruling on a Rule 12(b)(6) motion.” Hal Roach Studios v. Richard Feiner and Co., 896 F.2d
7 1542, 1555 n.19 (9th Cir. 1990) (citing Fort Vancouver Plywood Co. v. United States, 747
8 F.2d 547, 552 (9th Cir. 1984)). “However, material which is properly submitted as part of
9 the complaint may be considered.” Id. (citing Amfac Mortgage Corp. v. Ariz. Mall of
10 Tempe, 583 F.2d 426, 429 - 30 (9th Cir. 1978)). In addition, a court may, on a motion to
11 dismiss, take judicial notice of facts outside the pleadings “to matters of public record.”
12 Mack v. S. Bay Beer Distribs., 798 F.2d 1279, 1282 (9th Cir. 1986) (abrogated on other
13 grounds by Astoria Fed. Sav. and Loan Ass’n v. Solimino, 501 U.S. 104 (1991)).

14 **B. ANALYSIS**

15 “Where a federal court has jurisdiction by virtue of diversity of citizenship of the
16 parties, the court must follow state law” of the forum state. Burns v. Int’l Ins. Co., 919
17 F.2d 1422, 1424 (9th Cir. 1991). Here, this Court has jurisdiction under diversity of
18 citizenship and should therefore apply California law to the underlying causes of action.

19 **1. First cause of action for negligence against USG**

20 California Labor Code § 3602 generally provides that the benefits provided by the
21 workers’ compensation system constitute an employee’s exclusive remedy with respect to
22 his employer for injuries suffered in the course and scope of employment. See CAL. LAB.
23 CODE § 3602 (West 2003).

24 Plaintiffs assert their claims under the “power press” exception to Section 3602
25 given in California Labor Code § 4558(b):

26 An employee, or his or her dependents in the event of the employee's death,
27 may bring an action at law for damages against the employer where the
28 employee's injury or death is proximately caused by the employer's knowing

1 removal of, or knowing failure to install, a point of operation guard on a
2 power press, and this removal or failure to install is specifically authorized by
3 the employer under conditions known by the employer to create a probability
4 of serious injury or death.

5 Id. at § 4558(b). Here, “power press” is defined as “any material-forming machine that
6 utilizes a die which is designed for use in the manufacture of other products.” Id. at §
7 4558(a)(4).

8 The California Supreme Court has construed “die” to generally share two pertinent
9 characteristics: (1) “impart[ing] form to the material by impact or pressure *against* the
10 material, rather than *along* the material;” and (2) “impart[ing] to the material some version
11 of the die's own shape.” Rosales v. Depuy Ace Med. Co., 991 P.2d 1256, 1259 (Cal.
12 2000). These two characteristics are “logically related, since the die, acting by impact
13 against the material, can only alter the form of the material where it impacts it, necessarily
14 leaving an impression or cutout of its own shape (unlike a linear cutting blade that, moving
15 along the surface of the material, can be directed to cut out any desired shape).” Id. at 1259
16 - 60.

17 The first characteristic, impact or pressure against or through the material,
18 “particularly describes dies used in presses and hence limits the term as used in section
19 4558, subdivision (a)(4).” Id. at 1260. However, because “the first characteristic
20 necessarily implies the second,” courts may use the second characteristic as “a test of
21 whether a tool is a die within the meaning of section 4558, subdivision (a)(4).” Id.

22 **a. “Power press” exception is not precluded by Plaintiffs’**
23 **assertion that G. Moreno was assisting in cleaning debris**
24 **from the #1 Board Line at the time of his injury**

25 USG argues that the power press exception does not apply in this action, because the
26 #1 Board Line was not operating as a power press at the time of G. Moreno’s alleged
27 injuries, as G. Moreno asserts that he was cleaning debris from the machine at that time.
28 Doc. No. 7 at 6.) USG points to Rosales, in which the California Supreme Court

1 interpreted Section 4558 as follows:

2 Section 4558 applies only to injuries proximately caused by the employer's
3 knowing removal of, or failure to install, a point of operation guard on a
4 power press. (§ 4558, subd. (b).) An injury caused by the operation of a
5 machine that *could* operate as a power press, but was not so operating at the
6 time of injury, would not be proximately caused by the employer's removal
7 of, or failure to install, a point of operation guard on a power press. As the
8 evident intent of the statute was to provide a greater remedy for those
workers injured in power *press* accidents, moreover, it would make no sense
to interpret the statute as applying, as well, when the worker was operating,
say, a power *lathe*, even if the same machine could, under other
circumstances, have been used as a press. That the undisputed facts
demonstrate the V-notching tool is not a die was, therefore, sufficient to
support the grant of summary judgment to defendant.

9 Rosales, 991 P.2d at 1261.

10 Plaintiffs plead in their Complaint under their first cause of action:

11 10. Plaintiff, GILBERT MORENO, is informed and believes, and based
12 thereupon alleges, that the #1 Board Line is a material forming machine that
13 manufactures gypsum board by forming the gypsum board with tools that
14 impart shape to the materials by pressing against or through the materials.
15 Gypsum board is a material that is used in the manufacture of other products.
16 The # 1 Board Line has a wet end and a dry end. At the wet end of the
17 process, the materials which comprise the gypsum board are manufactured by
18 tools that impart shape to the materials by pressing and impacting against the
19 materials and involves the process of punching, stamping and extruding and
20 therefore constitute a power press which utilizes a die for the use in the
manufacture of gypsum board as these terms are defined in California Labor
Code § 4558. During the manufacturing process, the materials that become
the gypsum board are shaped, extruded and formed while proceeding on the
line. As part of the process of shaping, extruding and forming the gypsum
board, the materials are moved along by energized conveyor belts. Along the
conveyor belts, there are motorized pulleys which allow the materials to
move on the line and are an integral part of the manufacturing process of
shaping, extruding and forming the gypsum board.

21 (Doc. No. 1 at 3.)

22 Accepting all material allegations in the Complaint and all reasonable inferences as
23 true, as required under FRCP 12(b)(6), the Court must accept that “the #1 Board Line is a
24 material forming machine that manufactures gypsum board by forming the gypsum board
25 with tools that impart shape to the materials by pressing against or through the materials.”
26 (Id.) Therefore, the Court finds that Plaintiffs adequately plead facts to support its assertion
27 that the #1 Board Line is a power press.
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1 This case can be distinguished from Rosales, because the California Supreme Court
2 there was discussing the case in which the machine is not a power press (e.g., a power
3 lathe) but has the capacity to function as a power press. As Plaintiffs have adequately
4 plead facts to support its assertion that the #1 Board Line is a power press and not another
5 kind of machine, the Supreme Court's reasoning in Rosales would not apply here.

6 Furthermore, Plaintiffs plead the following in their Complaint under the first cause
7 of action:

8 13. On April 16, 2006, at or near 6:30 p.m., the point of operation guard for
9 the motorized pulley had been removed by the machine man of the #1 Board
10 Line in order clean debris that had accumulated on the energized pulley. At
11 that time and place, plaintiff, GILBERT MORENO, arrived and began
12 assisting the machine man who had moved the guard aside in order to clean
the debris. In the process of assisting the machine man, plaintiff's left arm
became entangled in the energized pulley, resulting in a degloving injury and
amputation of plaintiff's dominant left arm above the elbow.

13 (Doc. No. 1 at 4.) Here, Plaintiffs assert that G. Moreno was "assisting the machine man"
14 who was "clean[ing] the debris" at the time of his injuries. The Court finds that these facts
15 as plead could still support a finding that the #1 Board Line was operating as a power press
16 even during the debris cleaning process, as plaintiffs can reasonably argue that cleaning is a
17 regular part of power press machine operation.

18 Accordingly, the Court **DENIES** USG's Motion to Dismiss the First Cause of
19 Action of Negligence on these grounds.

20 **b. Plaintiffs adequately plead the point of operation guard**
21 **within the First Cause of Action**

22 USG argues that Plaintiffs failed to factually allege within the First Cause of Action
23 "what actually constitutes the point of operation guard" that was allegedly removed at the
24 time of injury. (Doc. No. 7 at 7.) However, Plaintiffs plead under the first cause of action
25 that "at the point of operation of the wet end of the #1 Board Line where the material
26 forming machine is shaping, extruding, and forming the materials into gypsum board, there
27 is a motorized pulley." (Doc. No. 1 at 3.) They further plead that there was "a point of
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1 operation guard designed to protect workers, including plaintiff, from coming into contact
2 with the motorized pulley.” (Id.) Moreover, Plaintiffs describe the point of operation
3 guard in more detail within its Second Cause of Action: that the modified version “was a
4 one piece point of operation guard approximately 5' long and 2' wide” and the original
5 version “was a two piece guard.” (Doc. No. 1 at 6.) The Court finds that Plaintiffs have
6 adequately plead the point of operation guard here and **DENIES** USG’s Motion to Dismiss
7 the First Cause of Action on these grounds.

8 **c. Plaintiffs adequately plead USG’s knowing removal of the**
9 **point of operation guard and its specific authorization of**
10 **this removal under conditions known by USG to create a**
11 **probability of serious injury or death**

12 California Labor Code § 4558(a)(6) (West 2003) states that “specifically authorized”
13 means “an affirmative instruction issued by the employer prior to the time of the
14 employee's physical injury or death, but shall not mean any subsequent acquiescence in, or
15 ratification of, removal of a point of operation safety guard.”

16 Plaintiffs plead in the Complaint under the first cause of action:

17 On April 16, 2006, and for some time prior thereto, defendants, USG
18 CORPORATION, and DOES I through XX, and each of them, had used the
19 hereinabove described material forming machine with a point of operation
20 guard that was not properly secured or anchored so as to allow the guard to
be removed, thereby exposing workers using the material forming machine to
the risk of serious injuries.

21 12. Plaintiff is informed and believes, and based thereupon alleges, that prior
22 to April 16, 2006, defendants, USG CORPORATION, and DOES I through
23 XX, and each of them, had a custom of practice of removing or rendering the
point of operation guards dysfunctional in order to clear accumulated debris
from the # 1 Board Line while the line was energized without following a
lock out/tag out procedure. Plaintiff is further informed and believes, and
24 based thereupon alleges, that defendants, USG CORPORATION, and DOES
I through XX, and each of them, by and through their supervisors, foreman
and plant managers, would discourage employees from shutting down the # 1
25 Board Line in order to clean accumulated debris.

26 (Doc. No. 1 at 3 - 4.) Here, Plaintiffs assert that USG had “a custom and practice” of
27 removing the point of operation guards while clearing accumulated debris “without
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1 following a lock out/tag out procedure” “to the risk of serious injuries,” such as G.
2 Moreno’s injuries here.

3 From this, the Court finds that Plaintiffs have adequately plead facts to support their
4 assertion that USG knowingly and specifically authorized the removal of the point of
5 operation guard to create a probability of serious injury or death. Therefore, the Court
6 **DENIES** USG’s Motion to Dismiss the First Cause of Action on these grounds.

7 **d. Plaintiffs did not adequately plead that the manufacturer**
8 **provided by specification for the attachment of the guards**
9 **and conveyed knowledge of the same to the employer.**

10 Under California Labor Code § 4558(c) (West 2003),

11 No liability shall arise under this section absent proof that the manufacturer
12 designed, installed, required, or otherwise provided by specification for the
13 attachment of the guards and conveyed knowledge of the same to the
employer. Proof of conveyance of this information to the employer by the
manufacturer may come from any source.

14 Plaintiffs plead in their Complaint under the first cause of action that Defendant Coe
15 designed, manufactured, and distributed the #1 Board Line “with a point operation guard
16 designed to protect workers, including plaintiff, from coming into contact with the
17 motorized pulley.” (Doc. No. 1 at 3.) Plaintiffs further plead that employer USG used the
18 #1 Board Line “with a point of operation guard that was not properly secured or anchored
19 so as to allow the guard to be removed” and “would discourage employees from shutting
20 down the #1 Board Line in order to clean accumulated debris” with the guard removed.
21 (Id. at 4 - 5.)

22 The Court finds that Plaintiffs did not adequately plead that manufacturer Coe
23 conveyed knowledge of the design, installation, and attachment of the guards onto the
24 power press to employer USG as required under California Labor Code § 4558(c). The
25 Court therefore **GRANTS** USG’s Motion to Dismiss the First Cause of Action on these
26 grounds and **GRANTS** Plaintiffs **thirty (30) days** from the date of the filing of this Order
27 to amend their complaint accordingly.

1 **2. Plaintiffs’ second cause of action for Strict Liability in Tort**
2 **against USG**

3 Under California law, “[i]n a strict liability action based on defective design, a
4 product is defective either (1) if the product has failed to perform as safely as an ordinary
5 consumer would expect when used in an intended or reasonably foreseeable manner, or (2)
6 if the benefits of the challenged design do not outweigh the risk of danger inherent in such
7 design.” Merrill v. Navegar, Inc., 28 P.3d 116, 125 (Cal. 2001) (internal quotations
8 omitted).

9 Plaintiffs plead in their Complaint as to the Second Cause of Action that USG was
10 “engaged in the business of manufacturing, designing, fabricating, maintaining and
11 repairing, replacement component parts for the material forming machines used by
12 defendants, including the point of operation guards without safety interlock devices.”
13 (Doc. No. 1 at 6.) Plaintiffs further asserted that these guards did not have a “safety
14 interlock device which would have de-energized the material forming machine if the point
15 of operation guard was removed or otherwise altered,” which “would have protected
16 workers from coming into contact with energized equipment at the point of operation.”
17 (Id.) Plaintiffs concluded that this failure “rendered the product defective in both its
18 manufacture and design” and made it “unsafe for its intended use when used in a
19 reasonably foreseeable manner.” (Id. at 6 - 7.)

20 The Court therefore finds that Plaintiffs adequately plead facts to support their cause
21 of action for strict liability in tort against USG, i.e., that the #1 Board Line failed to
22 perform as safely as an ordinary consumer would expect when used in an intended or
23 reasonably foreseeable manner. Accordingly, the Court **DENIES** USG’s Motion to
24 Dismiss the Second Cause of Action.

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26 **IV. CONCLUSION**
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1 For the reasons set forth above, the Court (1) **GRANTS** USG's Motion to Dismiss
2 the First Cause of Action for not adequately pleading that manufacturer Defendant Coe
3 Manufacturing Company ("Coe") conveyed knowledge of the design, installation, and
4 attachment of the guards onto the power press to employer USG as required under
5 California Labor Code § 4558(c); (2) **GRANTS** Plaintiffs **thirty (30) days** from the date of
6 the filing of this Order to amend their complaint accordingly; (3) **DENIES** USG's Motion
7 to Dismiss the First Cause of Action on all other grounds presented by USG; and (4)
8 **DENIES** USG's Motion to Dismiss the Second Cause of Action.

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10 **IT IS SO ORDERED**

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12 DATED: March 21, 2007

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14 Hon. Rudi M. Brewster
15 United States Senior District Court Judge

16 cc: Hon. Peter C. Lewis
17 United States Magistrate Judge

18 All Counsel of Record
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